PUBLIC PROSECUTOR

v.

JOEHARI BIN ABDULLAH @ LEONG KIN SING & ANOR.

HIGH COURT SABAH & SARAWAK, LABUAN
TUAN TEE AH SING JC
[CRIMINAL APPEAL NO. K. 41-07 OF 1995]
22 AUGUST 1995

CRIMINAL LAW & PROCEDURE: *Section 306 Criminal Procedure Code - No appeal against acquittal except with sanction in writing of Public Prosecutor - Whether sanction necessary when appeal conducted by Deputy Public Prosecutor - Whether consent of Public Prosecutor implicit - Criminal Procedure Code ss. 306, 307, 376.*

INTERPRETATION: *Section 306 Criminal Procedure Code - Words "except by" and "or with the sanction in writing of" - Whether to be read disjunctively - Effect.*

In this appeal by the Public Prosecutor against an order of acquittal made by the learned Magistrate, a preliminary issue arose as to whether the appeal, in order to legally proceed, ought to be sanctioned by the Public Prosecutor notwithstanding that the same was conducted by a Deputy Public Prosecutor himself. Counsel for the respondent contended that absence of sanction is fatal as sanction is clearly required by s. 306 of the Criminal Procedure Code (CPC). The Deputy Public Prosecutor, appearing as the appellant, argued that sanction was not required as consent of the Public Prosecutor was implicit. To support his argument the learned Deputy relied on s. 376 (iii) & (iv) CPC.

Held:

[1] The insertion of a comma after the words "except by" and the words "or with the sanction in writing of" in s. 306 CPC was deliberate and hence cannot be ignored. The effect of the commas can only be that these words were intended by the legislature to be read disjunctively and not conjunctively. It follows that s. 306 allows allows an appeal against an acquittal to be made either by the Public Prosecutor, or by any other person if that other person has obtained a sanction in writing of the Public Prosecutor.

[2] Section 306 CPC does not expressly state that the right ought to be personally exercised by the Public Prosecutor. So by virtue of s. 376(iii) of the CPC a Deputy Public Prosecutor is empowered to file notice of appeal against an acquittal under s. 306 and no sanction of the Public Prosecutor is required.

[Objection overruled].

Cases referred to:

PP v. Kirubakaran [1974] 2 MLJ 23 ***(dist)***

Prithipal Singh v. Datuk Bandar, Kuala Lumpur (Golden Arches Restaurant Sdn. Bhd. Intervener) [1993] 3 MLJ 336 ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 304, 305, 306, 307(i), 376(iii)(iv), 380(ii)(c)
Federal Capital Act 1960, s. 4(6), (7)
Federal Territory of Labuan, ss. 34, 381, 414
Juvenile Courts Act, s. 14

Other source referred to:
Criminal Procedure in Malaysia, Mimi Kamariah Majid, 2nd Edn., p. 431

For the public prosecutor - Mahmud bin Hj. Abdullah, DPP
For the respondents - Rakhbir Singh; M/s. Rakhbir Singh & Co.

JUDGMENT

Tee Ah Sing JC:

In this case both respondents were charged in the Magistrate's Court at Federal Territory of Labuan as follows:

> *Main Charge*
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> That you all jointly charge and the charge against you all is as follows:
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> That you all, on or about 29 April 1991 at about 8.30 p.m. at the JKR Stor, along Jalan Rancha Rancha, in the Federal Territory of Labuan, in furtherance of the common intention of you all, being a servant of Jabatan Kerja Raya, committed theft by stealing property, to wit, 2 (two) Robin Hand Compactor, in the possession of the said JKR, and thereby commited an offence punishable under s. 381 and read with s. 34 of the Penal Code.
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> *Alternative Charge*
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> That you all, on or about 29 April 1991 at about 10.30 p.m. at Tan Villa, Tanjong Aru, in the Federal Territory of Labuan, in furtherance of the common intention of you all, voluntarily assisted in disposing of property, to wit, 2 (two) Robin Hand Compactor, which you all had reason to believe to be stolen property, and that you thereby committed an offence punishable under s. 414 and read with s. 34 of the Penal Code.

The prosecution was conducted by Chief Inspector Tan Chen Kok.

At the close of the prosecution case the learned Magistrate acquitted and discharged both respondents in respect of the main charge and also the alternative charge.

The learned Deputy Public Prosecutor Sabah has filed notice of appeal against the said acquittal and discharge *vide* his notice of appeal dated 31 March 1995.

On the date of hearing of the appeal the learned Counsel for both respondents raised a preliminary objection that under s. 306 of the Criminal Procedure Code (FMS Cap. 6) (hereinafter referred to as "the CPC") the sanction of the Public Prosecutor is required. He submitted that in the record of appeal there has been no previous sanction in writing as required by statute. On this ground alone he urged the Court to dismiss the appeal. In support the case of *PP v. Kirubakaran* [1974] 2 MLJ 23 was cited. But the learned Deputy Public Prosecutor contended that the sanction in writing of the Public Prosecutor on an appeal against an acquittal is not required at all because in this case the appellant before the Court is the Deputy Public Prosecutor himself and consent is implicit. He relied on s. 376 (iii) and (iv) of the CPC.

Section 306 of the CPC reads as follows:

> 306. When an accused person has been acquitted by a Magistrate there shall be no appeal except by, or with the sanction in writing of, the Public Prosecutor.

The case of *PP v. Kirubakaran* [1974] 2 MLJ 23 cited by learned Counsel for the respondents dwelt with the question whether the Public Prosecutor was competent to prefer an appeal in a Juvenile Court decision and it was held that s. 14 of the Juvenile Courts Act deprives the Public Prosecutor of his competency to appeal against the decision of a Juvenile Court. So

this case is distinguishable. He also cited *Criminal Procedure in Malaysia* (2nd Edition) by Mimi Kamariah Majid at page 431 which reads:

> Section 306 allows an appeal against an acquittal by the accused person only with the sanction in writing of the Public Prosecutor.

The learned author did not give any reasons why she came to that statement. With great respect I am of the view that that is not a correct interpretation of s. 306 of the CPC.

The learned Deputy Public Prosecutor submitted that s. 306 of the CPC is divided into two limbs. One is an appeal by the Public Prosecutor and another is an appeal by any other person other than the Public Prosecutor. The operative words "by" and "or" should be read disjunctively. The word "by" means by the Public Prosecutor. And "or" means with the sanction in writing if it is not by the Public Prosecutor.

In the case of *Prithipal Singh v. Datuk Bandar, Kuala Lumpur (Golden Arches Restaurant Sdn. Bhd. Intervener)* [1993] 3 MLJ 336. His Lordship Eusoff Chin SCJ (as he then was) delivering the judgment of the Supreme Court at page 340 and 341 said:

> It is not disputed that from the time when the application was made until its disposal by the deputy director of valuation, the office of the Datuk Bandar was vacant. Section 4(7) of the Federal Capital Act 1960 provides as follows:
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> > Where the Commissioner is prevented from carrying out his function, exercising his powers, or discharging his duties by sickness, absence or any other cause, or where the office of the Commissioner is for any period vacant, the Secretary General of the Ministry of the Federal Territory, or such other public officer as may 'be authorised in writing by the Minister shall carry out the functions, exercise the powers and discharge the duties of the Commissioner.

Encik Karpal Singh stated that at the relevant period, there was in existence a Secretary General of the Ministry of the Federal Territoty. He was of the view that s. 4(7) of the Federal Capital Act 1960 requires that the Secretary General or other public officer must be authorized by the Minister to carry out the functions, exercise the powers and discharge the duties of the Datuk Bandar. He submitted that there is no evidence that the Minister had authorized the Secretary General under s. 4(7) of the Federal Capital Act 1960, and because of that, the Secretary General could not carry out the functions, or exercise the powers and discharge the duties of the Datuk Bandar. Consequently, the Secretary General's purported delegation of powers to the Deputy Director of Valuation under s. 4(6) of the Federal Capital Act 1960 was void and of no effect.

We hesitate to agree with the views expressed by Encik Karpal Singh. We note that a punctuation mark, namely a comma is inserted by Parliament after the words 'the Secretary General of the Ministry of the Federal Territory,' in s. 4(7) of the Federal Capital Act 1960.

Normally, to determine the intent of the law the Court would look at a sentence from a purely grammatical point of view so that in construing a statute, the Court will disregard a punctuation or will re-punctuate it if that be necessary, in order to arrive at the true purpose and, meaning of the words employed.

We find that Parliament had deliberately inserted a comma after the words 'Federal Territory' and the significance cannot be ignored because without the comma, the words 'Secretary General' and 'public officer' must be read conjunctively, but with the comma, these words must be read disjunctively.

We are of the view that under s. 4(7) of the Federal Capital Act, 1960, whenever the office of the Datuk Bandar is vacant, the Secretary General of the Ministry of the Federal Territory shall automatically carry out the functions and exercise the powers of the Datuk Bandar. Where, however, the office of the Datuk Bandar and that of the Secretary General are vacant, the Minister of the Federal Territory may authorize in writing any public officer to carry out the functions and exercise the powers of the Datuk Bandar.

I find that the legislature has deliberately inserted a comma after the words "except by" and another comma after the words "or with the sanction in writing of " which cannot be ignored because without the commas, the words "except by" and the words "or with the sanction in writing of" must be read conjunctively, but with the commas, these words must be read disjunctively.

I am of the view that s. 306 of the CPC allows an appeal against an acquittal to be made in two situations. Firstly the Public Prosecutor can appeal against the acquittal. When the appeal against acquittal is lodged by the Public Prosecutor no sanction in writing of the Public Prosecutor is required.

Secondly if the appeal against acquittal is by any other person then the any other person is conferred the right to appeal when there is a sanction in writing of the Public Prosecutor.

This will arise in a non-seizable case where the complainant is a private person. He may under s. 380(ii)(c) of the CPC, appear in person or by advocate and prosecute for an offence against his own person or property.

The relevant part of s. 307(1) of the CPC provides as follows:

> 307. (1) Except in any case to which s. 304 applies and subject to the provisions of s. 305 and 306 any person who is dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against such judgment, sentence or order ...

So it is clear from s. 307(i) of the CPC that in the case of a private prosecution the private complainant is given a right of appeal save that he cannot appeal when the defendant he prosecutes is acquitted unless s. 306 of the CPC has been complied with.

In other words in the case of a private prosecution if the private complainant wishes to appeal against the acquittal of the person he prosecuted he cannot appeal except with the sanction in writing of the Public Prosecutor.

I shall now deal with the pertinent parts of s. 376 of the CPC:

> 376. (i) The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.
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> (ii) ...
>
> (iii) The Public Prosecutor may appoint fit and proper persons to be Deputy Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and may exercise all or any of the rights and powers vested in or exercisable by the Public Prosecutor by or under this Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally.
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> (iv) The rights and powers vested in or exercisable by the Public Prosecutor by subsection (iii) and s. 68 (ii) shall be exercisable by the Public Prosecutor personally.

Section 306 of the CPC does not expressly state that the right of appeal are to be exercised by the Public Prosecutor personally.

So by virtue of s. 376(iii) of the CPC a Deputy Public Prosecutor can file notice of appeal against an acquittal under s. 306 of the CPC and no sanction in writing of the Public Prosecutor is required.

Reverting to our case I note that the notice of appeal dated 31 March 1995 filed in the Magistrate's Court at Federal Territory of Labuan is signed by Mohd. Yazid bin Mustaffa, Timbalan Pendakwa Raya Sabah.

In view of the aforesaid I therefore over-ruled the preliminary objection of the learned Counsel for the respondents. I hold that the appeal filed by the Deputy Public Prosecutor against the acquittal and discharge of both respondents has complied with s. 306 of the CPC. The Court will now hear the said appeal.